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U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
DETROIT

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946

DETROIT & WINDSOR FERRY COMPANY
a Michigan corporation,

Petitioner,

vs.

FRED L. WOODWORTH, Individually and as Former
Collector of Internal Revenue of the United States of
America, for the First District of Michigan,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT AND
BRIEF IN SUPPORT THEREOF**

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Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

To the Honorable Supreme Court of the United States:

The Detroit & Windsor Ferry Company, petitioner herein, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of that Court entered in this case on November 13, 1940, and therefore shows as follows:

I. SUMMARY STATEMENT OF MATTER INVOLVED

The record in the Circuit Court of Appeals, Sixth Circuit, a certified copy of which is presented herewith, shows no conflict of evidence, the defendant having introduced no evidence at the trial.

This is a suit to recover Federal income taxes paid under protest for the calendar years 1929 and 1930.

Petitioner is a Michigan corporation, and during the years 1929 and 1930, and for many years prior thereto, was engaged in operating ferries across the Detroit River between Detroit, Michigan, and Windsor, Canada (R. 33, 34). In connection with its ferry business, petitioner then owned and operated, simultaneously, four specially constructed ferry boats in connection with its ferry terminals and docks which included special ferry equipment consisting of superstructures with overhead landings to take care of a four boat service and to permit the handling of all foot passengers from the upper decks of the boats and automobiles from the lower decks (R. 34).

In June, 1927, the Ambassador Bridge Company was granted a franchise to build and operate a bridge across the Detroit River about two miles below petitioner (R. 39). Some preliminary work thereon was done in May, and the financing was announced April 9, 1927 (R. 39). August, 1930, was the time fixed for completion of the bridge. It actually opened November 15, 1929 (R. 41).

In the fall of 1927 there were substantial rumors concerning the construction of an international passenger

and vehicle tunnel under the Detroit River, a few feet from petitioner's Detroit terminal and passing under the route travelled by petitioner's ferry boats (R. 39). On January 3, 1928, petitioner was reliably advised that the tunnel had been financed (R. 39, 69-71). Shortly thereafter public announcement was made that the tunnel would be completed and opened by the end of the year 1930. It actually was completed and opened November 3, 1930 (R. 41, 46).

On approximately January 1, 1928, petitioner knew that the tunnel would be built and completed by the end of 1930, and it was then of the opinion that the construction and operation of the bridge and tunnel together would thereafter make the ferry business commercially unprofitable and that its ferry boats and special ferry equipment would have no value other than their scrap or salvage value (R. 40-1, 67-70, 73). Petitioner was abundantly justified in so concluding, and its expectations as to the effect of this new competition were fully realized (R. 44, 48, 53, 55).

In its return for the taxable year 1928, petitioner claimed a deduction from its income for obsolescence of its ferry boats and special ferry equipment of \$358,755.18. This figure was arrived at by taking the depreciated cost of these assets in 1928 (Ex. 1, R. 95) and deducting the estimated salvage value at the end of 1930 (R. 42) and spreading this amount over the years 1928, 1929 and 1930 (R. 42, 46).

The salvage value used by petitioner is admitted by respondent and there is no dispute but that it is excessive (R. 49-50, 52, 89-90).

On the audit of petitioner's return for 1928, the Government allowed an obsolescence deduction spread over a period of $4\frac{1}{2}$ years rather than 3 years. This was accepted by petitioner, and in its original return and claim for refund for 1929 and 1930 the remaining obsolescence was adjusted and spread over these years on the basis of the date on which the tunnel should actually be opened (Ex. 5, R. 97; Ex. 6, R. 115; Ex. 3, R. 13; Ex. 4, R. 19; R. 46-8).

The Government disallowed any deduction for obsolescence for 1929 and 1930, but did allow \$49,437.03 as "loss of useful value" (under Article 143 of Regulations 45) on the ferry "Pleasure" which had been taken out of service when the bridge opened (Ex. 11, R. 146; R. 73). Proper adjustment has been made by petitioner in its claim by reason of such allowance.

For 1930 and prior years, petitioner's ferry business was a very profitable one. After the opening of the tunnel there were no net earnings in spite of every effort by petitioner to reduce expenses and retain its business (R. 52-3). After 1930 the ferry boats and special ferry equipment could not be used profitably for any purpose (R. 51). The ferry boats could not be used in the excursion business and they were too large to be moved out of the Great Lakes area (R. 55-6, 91-2, 93). They could not be sold (R. 50-1). There was no other use for them on the Great Lakes (R. 51, 87). There was no other use to which the special ferry equipment could be put except the ferry service (R. 51). Such use was no longer profitable.

Petitioner, at a very substantial loss each year, continued the physical operation of the ferry business after

the end of the year 1930. Up to the time of the trial no determination had been made by it to abandon or scrap *all* the ferry boats. It did take two ferry boats out of service (resulting in the disuse of two of the four landings (R. 52)), the Pleasure upon the opening of the bridge, and the Britannia in January of 1932 (R. 53, 85). The Britannia was not disposed of but was held as a "stand-by" boat (R. 53, 79). At the time of the trial petitioner was still operating the other two ferry boats in the service. It was hoped by so doing that petitioner would be able to make a better sale of some of its other ferry assets on which no obsolescence was claimed (R. 80-86).

There is no claim that, if allowable at all, the amounts deducted were excessive or that they were not properly allocated between the two years in question.

II. BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS

(a) This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Title 28 U.S.C.A. Section 347.

(b) The statute of the United States involved in this proceeding is the Act of Congress known as the Revenue Act of 1928, approved May 29, 1928 (c. 852, 45 Stat. 791), the pertinent provisions of which are set forth in the Brief annexed hereto (pages 9-10).

(c) The judgment of the Circuit Court of Appeals for the Sixth Circuit now sought to be reviewed was entered by the said Court on November 13, 1940 (R. 179), and is final and erroneous.

III. STATEMENT OF QUESTION PRESENTED

The sole question is whether petitioner is entitled, under the provisions of the Revenue Act of 1928 (c. 852, 45 Stat. 791, Sec. 23 k), to a reasonable deduction for obsolescence from its income for the taxable years 1929 and 1930 on the ground that the profitable life of its special ferry equipment and ferry boats was ended, and said assets could not be sold thereafter for more than mere salvage value, by reason of the construction and operation of a competitive bridge and tunnel, though petitioner had made no determination to abandon or scrap said assets but continued to use a part of the same.

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The decision of the Circuit Court of Appeals for the Sixth Circuit decides an important question of Federal law which has not been but should be settled by this Court.

(b) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner prays that this Honorable Court will grant its writ of certiorari directed to said Circuit Court of Appeals for the Sixth Circuit, requiring the complete record of this cause in said Court to be certified to this Court, and that this Court will thereupon proceed to correct the errors herein complained of.

And your petitioner will ever pray, etc.

DETROIT & WINDSOR FERRY COMPANY.

By HAL H. SMITH,
Counsel for Petitioner.

JOSEPH A. VANCE, JR.,
BEAUMONT, SMITH & HARRIS,
Of Counsel.
Detroit, Michigan.
Dated January 10, 1941.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals is, as yet, unreported. It will be found on pages 180 to 185 of the Record. The unreported opinion of the District Court for the Eastern District of Michigan, Southern Division, which was affirmed by the Circuit Court of Appeals, is set forth on pages 166-169 of the Record.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28, U.S.C.A. Section 347.
2. The judgment of the Circuit Court of Appeals was entered on November 13, 1940 (R. 179). No petition for rehearing was filed.
3. The nature of the case, the rulings of the District Court and the Circuit Court of Appeals for the Sixth Circuit, and the reasons why a writ of certiorari should be granted are set forth in the foregoing petition.

4. The grounds upon which the writ is asked are two of the reasons set forth in Rule 38 5(b) of the Rules of your Honorable Court, as follows:

(a) The decision of the Circuit Court of Appeals decides important questions of Federal Law which have not been but should be settled by this Court, and

(b) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE AND QUESTION INVOLVED

The petition for the writ of certiorari contains a statement of the case and of the question involved, as well as a statement of the facts material to their consideration. In the interest of brevity the question involved and material facts are not repeated here.

STATUTE AND REGULATION INVOLVED

The statute and the regulation involved are Section 23 (k) of the Revenue Act of 1928, 45 Stat. 791, and Treasury Regulation 74, Article 206.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 23 "In computing net income there shall be allowed as deductions: . . .

“(k) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. . . .”

Treasury Regulation 74, Article 206:

“With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and can not be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due.”

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court.
2. The Circuit Court of Appeals erred in holding that an allowance for obsolescence can not be had without

abandonment or evidence of intention to abandon the property in question.

3. The Circuit Court of Appeals erred in holding that Treasury Regulation 74, Article 206, requires abandonment or a showing of an intention to abandon an asset before any allowance can be made for the obsolescence of that asset.

4. The Circuit Court of Appeals erred in sustaining the validity of Treasury Regulation 74, Article 206, in so far as that Regulation may require abandonment or evidence of an intention to abandon an asset as a condition precedent to a reasonable allowance for its obsolescence under Section 23 (k) of the Revenue Act of 1928.

5. The Circuit Court of Appeals erred in not entering judgment for petitioner in the amount claimed.

6. The Circuit Court of Appeals erred in defining "obsolescence," as that term is used in Section 23 (k) of the Revenue Act of 1928, and applying the same to the facts in this case in disregard of and contrary to the definitions of that term as used in such act and as laid down by the decisions of this Court.

7. The Circuit Court of Appeals erred in not holding that petitioner was entitled to an allowance for obsolescence to the extent, at least, of the ferry boats and special ferry equipment which in fact became "disused" because of the construction and operation of the bridge and tunnel.

ARGUMENT

1. The Decision of the Circuit Court of Appeals Decides Important Questions of Federal Law Which Have Not Been But Should Be Settled By This Court

This Court has never directly passed upon the question as to whether the abandonment of property at a future date prior to the end of its normal useful life is, in and of itself, a condition precedent to a reasonable allowance for the obsolescence of such property.

There is no dispute in this case but that petitioner would have been entitled to the obsolescence deductions claimed by it had petitioner abandoned or sold the property in question at the end of the year 1930.

If Treasury Regulation 74, Article 206, requires abandonment as such a condition precedent, the validity of that Regulation has not been passed on by this Court. If that Regulation does not make such a requirement it has never been so construed by this Court.

2. The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Court

In *Burnet v. Niagara Brewing Co.*, 282 U. S. 648, the taxpayer made deductions for obsolescence in its tax return for the years 1918 and 1919. They were disallowed by the Government because taxpayer continued to use the property to make and sell near beer and other non-intoxicating beverages. In the Circuit Court of Appeals (38 F. (2d) 217) the Commissioner made the contention that Article 143 of Regulation 45 of the Treasury De-

partment was applicable and that that article prohibited the deduction for the reason that abandonment had not already taken place. That court held such Regulation invalid for the reason that it imposed an additional condition on the taxpayer not prescribed by the statute. Apparently this contention was not repeated by the Commissioner in this Court, but he claimed that it must appear that the taxpayer foresaw with reasonable certainty that his property would not be useful in his business or any other business at some definite time in the future and that the property would have to be abandoned. The property was not in fact abandoned until 1928. This Court allowed the deduction for obsolescence. It said, page 655:

“There is no hard and fast rule, as suggested by the Government, that a taxpayer must show that his property will be scrapped or cease to be used or useful for any purpose, before any allowance may be made for obsolescence.”

And, on page 656:

“Notwithstanding diligent efforts, the property could not be put to any profitable use or sold for more than a fraction of its value in 1917. . . .

“. . . The company was unable to find any profitable use to which the property could be put.”

In *Gambrinus Brewery Co. v. Anderson*, 282 U. S. 638, decided on the same day as the *Niagara Brewing Co.* case, *supra*, this Court allowed the deduction for obsolescence even though the buildings were subsequently used after prohibition for the manufacture of non-intoxicating beverages, saying, page 645:

“Undoubtedly it was obvious from the beginning of that period (i. e., the prohibition period) that buildings not commercially adaptable to any use

other than brewing intoxicating liquor would suffer obsolescence because of the destruction of that business."

There is, in the above cases, no trace of the theory that there must be abandonment of the property at the end of the period of obsolescence. In both these cases *the property was used after prohibition to perform the identical processes for which it had been used theretofore*. The only change was that an additional process was added for de-alcoholizing the beer.

This Court, in the *Niagara Brewing Co.* case, *supra*, page 654, defines obsolescence as follows:

"The word is much used and its meaning depends upon and varies with the connections in which it is employed. It has been said to be 'the condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions.' Obsolescence is not necessarily confined to particular elements or parts of a plant; the whole may become obsolete. Obsolescence may arise as the result of laws regulating or forbidding the particular use of the property as well as from changes in the art, the shifting of business centers, loss of trade, inadequacy or other causes."

These two opinions are, we think, applicable and conclusive in the present case. If obsolescence was allowed in them (and it was) it should be allowed here. Our case is even stronger than the brewery cases because, there, it was merely conjecture whether the property could be used profitably after prohibition, and no such determination was made by the brewery companies at the time the prohibition law went into effect. In our case it was clear that if the depreciated cost (less salvage

value) of these assets was not recovered by the end of 1930 it never could be recovered because profitable life in any use was then ended.

In *United States Cartridge Co. v. U. S.*, 284 U. S. 511, the Commissioner disallowed a deduction for obsolescence, claimed on certain buildings in taxpayer's income tax return for 1918, for the reason that the company had not abandoned the use of the buildings or permanently devoted them to a use radically different from their original one (p. 515). After again defining obsolescence, page 516, this Court held that the value of the assets remaining after 1918 was properly to be regarded in the nature of salvage and that the taxpayer was entitled to the obsolescence deduction, indicating clearly that abandonment was not required as a condition to such allowance.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be granted, as prayed for.

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Of Counsel.
January 10, 1941.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 695

DETROIT & WINDSOR FERRY COMPANY, A MICHIGAN
CORPORATION, PETITIONER

v.

FRED L. WOODWORTH, INDIVIDUALLY AND AS FORMER
COLLECTOR OF INTERNAL REVENUE OF THE UNITED
STATES OF AMERICA FOR THE FIRST DISTRICT OF
MICHIGAN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is unreported. (R. 166-169.) The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 180-185) is reported in 115 F. (2d) 795.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1940. (R. 179.) The petition for a writ of certiorari was filed January

13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTION PRESENTED

Petitioner operates a ferry business which has suffered diminution as a result of the construction of a competing bridge and vehicular tunnel. Is it entitled to a deduction on account of "obsolescence" under Sec. 23 (k) of the Revenue Act of 1928, notwithstanding that it continues to conduct its business without abandonment of its facilities?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(k) *Depreciation*.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 206. *Obsolescence*.—With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future

date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and can not be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due.

STATEMENT

The District Court's findings of fact (R. 160-163) may be summarized as follows:

The taxpayer, a Michigan corporation, has been engaged for many years in the business of operating ferry boats between Detroit, Michigan, and Windsor, Canada, and operating excursion boats between Detroit and nearby resorts. In 1929 and 1930, the taxable years in question, the taxpayer owned and operated in its business the ferry boats *Brittania*, *LaSalle*, and *Cadillac*, and continued to operate them until the time of this action. The

Cadillac was obtained and put into operation by the taxpayer in April, 1928. A fourth boat, the *Pleasure*, owned and used by the taxpayer during a part of 1929, was retired in the latter part of that year. (R. 160.)

In Detroit the taxpayer has continuously operated under a city ordinance, paying a yearly license fee. In Windsor the taxpayer operated under a charter from the Dominion of Canada until February, 1937, the charter having been renewed several times upon the taxpayer's application between the time of the opening of the bridge and tunnel hereinafter mentioned and February, 1937. Since February, 1937, the taxpayer's ferry boats have cleared as foreign ships on the Windsor side on each trip. (R. 161.)

In May, 1927, the taxpayer was informed that an international bridge was to be constructed over the Detroit River between Detroit and Windsor, about two miles from the ferry, to be opened in August, 1930. Construction of the bridge was begun in May, 1927, and the bridge was opened to travel November 15, 1929, nine months ahead of schedule. In September, 1927, taxpayer was informed that a pedestrian and vehicular tunnel under the Detroit River was to be constructed, to be opened in 1930. Construction was begun in June, 1928, and the tunnel was opened to travel November 3, 1930. In each of the years 1931 to 1937, inclusive, the taxpayer operated its ferry business at a loss, using therein as its principal income producing property

all of the assets upon which it claims obsolescence deductions for 1929 and 1930. In each of those years it carried several hundred thousand cars, the number varying from 744,000 in 1931 to 320,000 in 1936. In each of those years it carried a large number of foot passengers, the number varying from 4,021,000 in 1931 to 1,795,000 in 1936. (R. 161.)

The taxpayer has at no time concluded or determined that any of the assets upon which obsolescence deductions are claimed for the years 1929 and 1930 would be abandoned or discontinued as non-useable income producing property in its ferry business at any time prior to the end of their normal useful life. Late in 1927 or early in 1928, the taxpayer did conclude that its ferry business could not be conducted at a profit after December, 1930, when it understood that the bridge and tunnel would be opened to traffic, but at no time has the taxpayer ever determined to discontinue the operation of its ferry business, and at the time of trial it had no intention of discontinuing the operation of the business at any definite time. (R. 162.)

The ferry boats and equipment upon which obsolescence deductions are claimed have been continuously used up to the time of this suit for the purposes for which they were acquired and at the time of the trial they were being used for such purposes. They were at such time and have continuously been the principal income producing factors in the taxpayer's ferry business. (R. 162.)

In its income tax return for 1928, the taxpayer deducted \$365,059.61 as "obsolescence" on the boats and equipment in question. The Commissioner reduced this deduction to \$227,384.67 and determined an income tax deficiency accordingly, which was assessed November 22, 1930, and paid by the taxpayer in due course. The question raised in the instant case, that is, the propriety of such an obsolescence deduction, was not raised by the Commissioner for the year 1928. (R. 162.)

In May, 1930, taxpayer filed its income tax return for 1929, reporting a liability of \$43,641.58, and showing a deduction of \$358,755.16 as "obsolescence" on its ferry boats and equipment. The Commissioner disallowed the entire deduction and assessed a deficiency of \$37,174.95, which the taxpayer paid, together with \$6,652.28 interest. In redetermining the taxpayer's taxable income for 1929, the Commissioner did allow a deduction of \$49,437.03 on account of the loss of useful value of the *Pleasure* which was retired in 1929. (R. 162-163.)

In March, 1931, the taxpayer filed its income tax return for 1930, reporting no tax due and showing a deduction for "obsolescence" on boats and equipment in the amount of \$358,755.18. The Commissioner disallowed the deduction and found a deficiency in tax of \$31,451.26, which the taxpayer paid, together with \$4,076.17 interest. (R. 163.)

In computing the taxable income for the years 1929 and 1930, the Commissioner allowed normal depreciation deductions with respect to the assets

in question. The taxpayer filed timely claims for refund for the years 1929 and 1930 and upon their disallowance by the Commissioner brought this suit for refund. (R. 163.) The District Court held that the assets in question were not in the process of becoming obsolete since it did not appear that they would become unuseable to the taxpayer in business prior to the termination of their normal useful lives. (R. 164-169.) Judgment was entered for the Collector. (R. 170.) The Circuit Court of Appeals affirmed. (R. 179-185.)

ARGUMENT

The taxpayer urges (Br. 12, *et seq.*) a conflict with *Burnet v. Niagara Brewing Co.*, 282 U. S. 648; *Gambrinus Brewery Co. v. Anderson*, 282 U. S. 638; and *U. S. Cartridge Co. v. United States*, 284 U. S. 511.

None of those cases dealt with a regulation like Article 206 of Treasury Regulations 74, *supra*, which is controlling here. All of those cases involved the Revenue Act of 1918, c. 18, 40 Stat. 1057. A regulation like that here applicable first appeared as Article 166 of Treasury Regulations 65, promulgated under Section 214 (a) (8) of the Revenue Act of 1924, c. 234, 43 Stat. 253. Subsequently both the statute and regulation have been repeated without change here material, as follows: Article 166, Treasury Regulations 69, with reference to Section 214 (a) (8) of the Revenue Act of 1926, c. 27, 44 Stat. 9; Article 206, Treasury Regulations 74, with

reference to Section 23 (k) of the Revenue Act of 1928; Article 206 of Treasury Regulations 77, with reference to Section 23 (k) of the Revenue Act of 1932, c. 209, 47 Stat. 169; Article 23 (1)-6 of Treasury Regulations 86, 94 and 101, with reference to Section 23 (1) of the Revenue Acts of 1934, c. 277, 48 Stat. 680; 1936, c. 690, 49 Stat. 1648; and 1938, c. 289, 52 Stat. 447, respectively. If these regulations do not arbitrarily depart from the statute they are within the competence of the Commissioner and should be controlling. Cf. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90; *Helvering v. Winmill*, 305 U. S. 79, 83; *Morgan v. Commissioner*, 309 U. S. 78, 81. That these regulations do not go beyond the statute is confirmed by *Real Estate Title Co. v. United States*, 309 U. S. 13, where they were cited and quoted with apparent approval (pp. 15-16).

The regulations require the taxpayer to show "clearly" conditions which will result in the property's "being abandoned at a future date prior to the end of its normal useful life." In the instant case the taxpayer's ferry business was subjected to greatly increased competition when a bridge and tunnel were opened in 1929 and 1930, but it has not abandoned its business and has denied any intention of doing so. The assets claimed to be obsolete and sought to be charged off in the three years 1928, 1929 and 1930, continued to be the principal income producing factors in the taxpayer's ferry

business, up to the time of the trial in 1938. The Circuit Court of Appeals correctly determined that there was no showing that the assets would have to be abandoned prior to the termination of their normal useful life.

Moreover, apart from the fact that the cases relied upon by petitioner did not involve the regulations here applicable, they are further distinguishable because each involved property which could not continue to be applied to the use for which intended.

The Circuit Court of Appeals for the Third Circuit, upon facts in many respects similar to those in the instant case, refused to allow deductions for obsolescence in *State Line & Sullivan R. Co. v. Phillips*, 98 F. (2d) 651 (C. C. A. 3d), and this Court denied certiorari, 305 U. S. 635.

CONCLUSION

The decision of the Circuit Court of Appeals is not in conflict with any decision of this Court or any other Circuit Court of Appeals. It is respectfully submitted that the petition should be denied.

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